

HONG GEOK CHENG v. ELIZABETH JACQUES

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Syed Othman F.J.) May 6 & July 3, 1980]

[Kuching — Federal Court Civil Appeal No. 216 of 1979]

Landlord and Tenant — Statutory tenant — Widow of tenant — Whether protected under the law — Rent Control Ordinance (Sarawak Cap. 86), ss. 18(c) & 19.

The appellant had let premises belonging to him to a Dr. Jacques who used it for his medical practice. A notice to quit had been given to the tenant but he continued to occupy the premises and tender the rent. After the death of the tenant, the appellant claimed possession of the premises from the widow, the respondent. His application was dismissed and he appealed to the Federal Court.

Held: the respondent was protected by section 18(c) of the Rent Control Ordinance, as she was the widow of the tenant residing with him at the time of his death.

Cases referred to:-

- (1) *Wee Ban Yan v. Eyun Eng Lowi* [1963] M.L.J. 62.
- (2) *Tan Khio Soi & Anor. v. Ban Hin Lee Bank Ltd.* [1964] M.L.J. 71, 72.
- (3) *Keeves v. Dean* (1924) 1 K.B. 685, 690.
- (4) *John Lovibond & Sons Ltd. v. Vincent* [1929] 1 Q.B. 687.
- (5) *Hoo Yan Meng v. Esah* [1970] 1 M.L.J. 126, 129.
- (6) *N. Hamid v. Perumal* [1951] M.L.J. 147.
- (7) *Brown v. Brash and Ambrose* [1948] 2 K.B. 247.
- (8) *Chee How Lim v. Sin Jiak Lang* [1954] S.C.R. 1, 9-10.
- (9) *Sim Swee Teng v. Tney Swee Kiaw* Sarawak Civil Appeal No. 12 of 1951 (unreported).

FEDERAL COURT.*Chew Pok Oi* for the appellant.*Patrick Tan* for the respondent.*Cur. Adv. Vult.*

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): The sole question in this appeal is whether respondent was protected under section 18(c) of the Sarawak Rent Control Ordinance (Cap. 86).

Briefly, the facts are that appellant is the registered proprietor of premises known as No. 94, Padungan Road, Kuching which are subject to Cap. 86 and that respondent is the widow of the late Dr. G. Jacques. On April 2, 1964 appellant and Dr. Jacques executed a Memorandum of Sublease whereby the former agreed to sublease the ground floor of the premises to the latter for a period of five (5) years at a monthly rent of \$100 and in addition \$200 per month as hire charges for furniture and other fittings and equipment on the premises. As it was not registered the sublease was not considered valid under section 161 of the Land Code (Cap. 81). Nevertheless, Dr. Jacques went into occupation and paid \$300 per month for rent and charges. He carried on medical practice under the style of Asia Clinic. He, his wife and son lived in another house but merely used the premises as a clinic. Respondent, a qualified nurse, assisted him. On April 11, 1969 appellant gave Dr. Jacques a month's notice to quit from the premises with effect from May 1, 1969. After the expiry of the notice he continued to use the premises and tender rent and charges. However, no rent receipt was issued after March, 1969. There can be little doubt that Dr. Jacques was a monthly contractual tenant and was protected by Cap. 86. Appellant could only get pos-

session of the premises under one of the grounds set out in section 15 of Cap. 86. Dr. Jacques died on July 31, 1977. Respondent was made executrix of her husband's estate by virtue of the Probate granted her on October 28, 1977.

It is the contention of appellant that respondent could only be a statutory tenant within section 18(c) if she was residing with Dr. Jacques *on the demised premises* at the time of his death. Reference was made to *Wee Ban Yan v. Eyun Eng Lowi*,⁽¹⁾ a decision based on section 2 of the Control of Rent Ordinance, 1956 of Peninsular Malaysia. It was held that a widow in order that she might be a "tenant" within the meaning of the Control of Rent Ordinance must be in personal occupation of the premises at the time of the husband's death. In Peninsular Malaysia "tenant" is defined in the Control of Rent Ordinance to mean, *inter alia*, "the tenant of premises in respect of which a tenancy exists and includes a statutory tenant and the widow of the tenant who was residing with him at the time of his death". It would therefore seem that in Peninsular Malaysia a widow is a protected tenant because she is expressly mentioned in the definition of tenant. The definition of "tenant" in the Sarawak Rent Control Ordinance is different as it includes a statutory tenant. For this reason respondent submitted that in Peninsular Malaysia it was by a process of reasoning that a widow became a statutory tenant whereas in Sarawak it is expressly set out in section 18(c).

The intention of the Legislature in enacting Cap. 86 was to give tenants protection because of shortage of shop premises in urban areas. Respondent became a statutory tenant on the death of her husband and was protected by Cap. 86. The learned judge rightly pointed out that when Cap. 86 was enacted in 1948 the definition of statutory tenant in section 18 was the same as those in Singapore and Peninsular Malaysia Ordinances. But an amendment was made in 1951 by the addition of a new sub-paragraph (c) to section 18 which reads:—

"18. The following persons are statutory tenants under this Ordinance, namely—

(c) the widow of a tenant who was residing with him at the time of his death or, where a tenant leaves no widow or is a woman, such member of the tenant's family so residing as aforesaid as may be decided in default of agreement by the court."

The purpose of the amendment was clearly to give protection to the widow of a statutory tenant. The objects and reasons for the amendment were given by the then Sarawak Attorney-General, A.J. Grattan-Bellew in these words:—

"Recently it has been held by the Supreme Court that the widow of a statutory tenant, residing with him at the time of his death, does not become a statutory tenant and is not protected by the Ordinance. The amendment proposed by Clause 6 will, in such circumstances, give the protection of the Ordinance to a widow or where the tenant leaves no widow or is a woman to a member of the tenant's family residing with the tenant at the time of death."

The Sarawak Ordinance makes no distinction between business and residential premises. Section 3 defines "premises" to mean "any dwelling house, flat, factory, warehouse, office, counting house, shop, school and any other building in which persons are employed or work and any part of any premises let or sublet

separately and includes any land whereon any such building is or has been erected with the consent of the landlord."

Cap. 86 permits separate lettings. Some tenants may reside on the premises, others may not. If the premises were used as office then the tenant would probably reside elsewhere. So Cap. 86 does not differentiate between a widow residing on demised premises and a widow not so residing. However, it does require a widow to reside with her husband at the time of his death. In section 18(c) the words "at the time of his death" qualify the word "widow" rather than "premises". That the husband might have other wives and might be carrying on different businesses in different premises were possibilities. The court should only be concerned when the possibilities become realities and not indulge in speculation.

In construing Cap. 86 one must look at it as a whole. The duty of the court is to interpret the law which the Legislature enacts. It is not the duty of the court to fill in gaps in the Ordinance. That is a matter for the Legislature. Section 18(c) is clear. It merely says that the widow must reside with her husband at the time of his death. It says nothing about residing with him *on the demised premises* at the time of his death. The Sarawak Ordinance is different from the Singapore and Peninsular Malaysia Ordinances in this respect. Section 18(c) protects a widow who resides with her husband at the time of his death. The law does not say she must be residing with him *on the demised premises* at the time of his death. That the Legislature intends to protect the widow of a deceased tenant was clear when Cap. 86 was amended in 1951. The amendment expressly also makes the widow of a deceased tenant a statutory tenant. Section 3 defines "tenant" to mean "the tenant of premises in respect of which a tenancy exists and includes a statutory tenant and, in the case of a sub-tenancy, a sub-tenant to whom the premises or any part thereof is sublet". In the light of this definition a widow is protected by Cap. 86 whether her deceased husband was a tenant or statutory tenant so long as she was residing with him at the time of his death.

Dr. Jacques used the premises for his medical practice. What we may describe as his office. In this case it is important to construe the word "residing". Most professional people work in the day time in their offices, schools or factories but do not normally reside in such places with their families. In its usual meaning a person may be said to reside where he sleeps. The fact that he may be working somewhere else during the day does not mean that he is not residing at the house to which he returns at night. It is not in dispute that Dr. Jacques ran a medical clinic during the day at the premises but that he resided in another house with his family at night.

An interesting point concerns the termination of the statutory tenancy. In view of the peculiarity of the Sarawak Ordinance we are inclined to agree with the learned judge that even if the monthly contractual tenancy of Dr. Jacques had been terminated, his statutory tenancy had not been properly terminated. He became a statutory tenant on the termination of his contractual monthly tenancy. Where a tenant is protected by the Ordinance the landlord can only

obtain possession under one or more grounds of section 15. Subsection 3 of section 15 states that "nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law". Section 19(b) provides that:—

"19. A statutory tenant shall hold the premises of the landlord upon the following terms and conditions, namely—

(b) his tenancy shall be subject to be determined by such notice as would have been required by law to determine a monthly tenancy of the premises containing no express provision for determination."

Under section 161 of the Land Code (Cap. 81) the unregistered five (5) years' sublease was clearly valueless as a defence to a claim for possession. However, the tenant by going into occupation, and the landlord accepting rent monthly a contractual monthly tenancy came into existence. Such tenancy required no registration to validate it. It was conceded that this tenancy was terminated by a proper notice to quit and that by remaining there after the expiration of the notice to quit Dr. Jacques became a statutory tenant. It would have been possible to argue that the monthly contractual tenancy was not properly terminated as Dr. Jacques was protected by Cap. 86. The landlord could only obtain possession on one of the grounds specified in section 15. There is no evidence that the tenant was in arrears of rent or in breach of any terms or conditions of the tenancy. The landlord had abandoned his claim under section 15(1) (i). Consequently, whether Dr. Jacques was a tenant or had become a statutory tenant, the learned judge was right to find that appellant failed to prove that he was entitled to possession of the demised premises under Cap. 86.

Another contention of appellant is that the right of a statutory tenant under the Sarawak Rent Control Ordinance (Cap. 86) extinguishes on his death and cannot be transmitted by will. In support he relied on *Tan Khio Soei & Anor. v. Ban Hin Lee Bank Ltd.*,⁽²⁾ *Keeves v. Dean*,⁽³⁾ *John Lovibond & Sons Ltd. v. Vincent*,⁽⁴⁾ In addition to these cases the learned judge also referred to *Hoo Yan Meng v. Esah*,⁽⁵⁾ *N. Hamid v. Perumal*,⁽⁶⁾ *Brown v. Brash & Ambrose*⁽⁷⁾ and *Chee How Lim v. Sim Jiak Lang*.⁽⁸⁾ Furthermore the learned judge had reviewed the various authorities cited and observed the differences in the scope of the English Rents Acts, the Control of Rent Ordinances of Singapore and Peninsular Malaysia from the Sarawak Rent Control Ordinance. He cautioned against following these authorities blindly. We agree entirely with him and do not propose to go into those cases decided under legislation similar in general tenor to the Sarawak Rent Control Ordinance but differing widely in many important details. For instance, section 18(c) which we are asked to construe is peculiar to Sarawak as it is not found in the Control of Rent Ordinance of Singapore or Peninsular Malaysia.

Advocate for respondent pointed out that it was not his case that the statutory tenancy was transmitted by will. It is not in dispute that as a general rule the right of a statutory tenant is purely personal and cannot be transmitted by will. The point is there is nothing to prevent the Legislature from protecting a widow by making her a statutory tenant if she resided with him at the time of his death. This was done

when Cap. 86 was amended by the inclusion of paragraph (c) to section 18.

The Sarawak Attorney-General stated that section 18(c) was enacted because of a Supreme Court decision that the widow of a statutory tenant residing with him at the time of his death did not become a statutory tenant and was therefore not protected. The decision is the unreported case of Civil Appeal No. 12 of 1951 in the Supreme Court of Sarawak dismissing an appeal on July 27, 1951 from the First Circuit Court in the case of *Sim Swee Teng v. Tnay Swee Kiaw*⁽⁹⁾ (Civil Case No. 44/51). The facts are substantially similar to the case now before us. There plaintiff was the registered proprietor of No. 14, Gartak Street, Kuching. Defendant's husband was the tenant of the ground floor of the premises paying rent of \$45 per month. His tenancy was a monthly one. On February 1, 1951 plaintiff sent a notice to defendant's husband giving him one month to quit. When the notice expired he remained on the premises. He died on March 28, 1951. Defendant became administratrix of his estate and was in occupation of the premises. Plaintiff claimed possession on the ground that defendant was a trespasser as her husband's contractual tenancy was terminated before his death and defendant was never accepted as tenant.

Digby J. held that on defendant's husband's death he was at best a statutory tenant. Defendant based her claim entirely on her letters of administration to the husband's estate. The learned judge observed in these words:—

"But a statutory tenancy is no more than a personal right to continue in occupation. It is not properly capable of devolving on death. It cannot be disposed of by will, nor does it pass upon an intestacy to the tenant's heirs. Were this not so grave difficulties would result. A statutory tenancy exists only if, on the state of facts appertaining at the termination of the previous tenancy, the person claiming to be the statutory tenant was protected by section 16(1) of the Rent Control Ordinance, 1948, (see judgment of Murray Aynsley C.J. in the Singapore case *Ida-Fernandez (m.w.) v. M. Murugiah* [1950] M.L.J. page 83; a decision which I have followed in this court). A person who was not then a protected tenant cannot be a statutory tenant. If a statutory tenancy was capable of devolving on death the point of time to which the court would have to look in order to ascertain whether a personal representative or a beneficiary, as the case might be, had been protected by the Ordinance and had accordingly become a statutory tenant, would not be the date of termination of the previous tenancy, but, in the case of personal representatives, the date of death, and, in the case of beneficiaries, the date the interest was transferred to them by the executors or administrators.

This difficulty is overcome in England by including the widow of a tenant, who was living with him at his death, in the definition of 'tenant'. Unfortunately the Sarawak Ordinance does not contain a similar provision. This appears to be a serious gap in the law as grave hardship may be caused to the bereaved dependants of a statutory tenant. A copy of this judgment will be served on the Attorney-General in order to draw his attention to the point."

In dismissing the appeal Dr. R.Y. Hedges, the Chief Justice stated:—

"If I could allow this appeal I should be happy to do so as it is a case involving some hardship. I have been much assisted by the arguments put forward by Mr. Dunbar and it is with regret that I find myself unable to give to the term 'statutory tenancy' the extended meaning he sought to apply."

As the appropriate amendment was made to the Ordinance in 1951 for the protection of the widow of a statutory tenant by section 18(c), the learned judge

was able to avoid making a decision which would cause grave hardship on the deceased's widow and son. We are happy to say that what the Legislature had done nearly 30 years ago in filling the gap in the law makes it possible for the court today to protect a widow of a statutory tenant who would otherwise be thrown out of the premises.

Section 18 indicates quite clearly who are to be regarded as statutory tenants for the purpose of Cap. 86. In our view, this provision would not be necessary if a statutory tenant could be said to have interest which he could assign and which could form part of his estate. Cap. 86 makes no distinction between domestic and business premises. In other words, the Legislature intended to put tenants of business premises and tenants of domestic premises in the same position so that Cap. 86 applies equally to all premises affected by its provisions. It is therefore not surprising that in the light of the definition of "premises" the Legislature purposely omitted the words "on the demised premises" in section 18(c). It would be ridiculous to find the widow and members of the family of the deceased tenant who merely used the premises as an office, factory or school residing with him in his office, factory or school when he had another proper and perhaps better home to share with his family not protected by Cap. 86.

If it is thought that such protection is no more needed by widows or members of the family of deceased tenant this can easily be changed by the Legislature. Until the law is changed the court must construe the law as it stands.

For reasons given we would dismiss the appeal with costs. Deposit to respondent against taxed costs.

Appeal dismissed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Yong & Co.*

YEEP MOOI v. CHU CHIN CHUA & ORS.

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) June 7 & August 10, 1960]

[Kota Bharu — Federal Court Civil Appeal No. 14 of 1979]

Contract — Deposit of money with pawnshop — Whether person depositing is a moneylender — Whether contract illegal — Person accepting deposit not borrowing company — Whether money can be recovered — Moneylenders Act, 1951, ss. 2 and 3 — Banking Ordinance, 1958, s. 2 — Pawnbrokers Enactment, Trengganu, 1356 — Borrowing Companies Act, 1969, ss. 2 and 3 — Contracts Act, 1950, s. 66.

Moneylending — Whether person depositing money with pawnshop is a moneylender — Scope of Moneylenders Ordinance, 1951, s. 3.

The appellant had deposited some money with a person carrying on the business of a pawnshop. She brought an action for the recovery of the money. Her action was dismissed, as it was held that she was an unlicensed moneylender and the contract was void and unenforceable. Her appeal to the High Court was dismissed and she appealed to the Federal Court.

Held: (1) although the appellant had lent her money on interest she was not a moneylender as she did not carry on the business of moneylending;

(2) the person accepting the deposits was carrying on a borrowing business and as he was not a public company or a licensed borrowing company, the transaction was illegal, void and unenforceable;